UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NORMAN A. NEWHALL, Plaintiff, v. NORMAN P. POSNER and SAMET & COMPANY, PC, Defendants.	)	CIVIL ACTION NO. 03-11279-PBS

MEMORANDUM AND ORDER

March 4, 2004

Saris, U.S.D.J.

I. INTRODUCTION

The Defendants, Norman P. Posner ("Posner") and Samet & Company, PC ("Samet"), move for summary judgment on the ground that Plaintiff failed to file this accounting malpractice action within the time allowed by Mass. Gen. Laws Ann. ch. 260, § 4 (2003). After hearing, Defendants' motion is **ALLOWED**.

II. SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Barbour v. Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995) (quoting Fed. R. Civ. P. 56(c)). "To succeed [in a motion for summary

judgment], the moving party must show that there is an absence of evidence to support the nonmoving party's position." Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990); see also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

"Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.'" Barbour, 63 F.3d at 37 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). "There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" Rogers, 902 F.2d at 143 (quoting Anderson, 477 U.S. at 249-50) (citations and footnote in Anderson omitted). The Court must "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." Barbour, 63 F.3d at 36.

III. FACTUAL BACKGROUND

The following facts are undisputed, except where otherwise noted.

The Plaintiff, Newhall, received an accounting certificate from Bentley College in 1950 and an accounting degree from Northeastern University in 1959. Newhall is not a CPA and has

never sat for the CPA exam. From 1966 through about 1997, Newhall was at various times an employee, the controller, the treasurer, and a member of the board of TAD Resources International, Inc. ("TAD"). During his tenure at TAD, Newhall acquired a number of shares in the company. In 1997, TAD was sold, which caused Newhall to realize capital gains. At that time, he was no longer the treasurer.

Defendant Samet provided accounting services, including the preparation of taxes, to TAD beginning in the early 1960's. Around 1976, Defendant Posner became the Samet accountant primarily responsible for TAD.

When TAD was sold in 1997, Samet prepared the final corporate subchapter S tax return. Included in the corporate tax return were the individual K-1's for the corporation's shareholders, including Newhall. Newhall never retained Samet or Posner as his personal accountant and does not recall ever asking them for advice regarding his personal returns. Newhall knew that some (but not all) of TAD's income was earned in California.[1] He believed that Detroit was the largest TAD location, but this turned out to be untrue. He also knew that TAD operated in New England. However, Newhall did not believe that he had to, nor did he, file a 1997 tax return in the State

[1]Specifically, 19.6% of TAD's income was earned in California.

of California. When Posner, in a conversation that took place in the early 1990's, attempted to inform Newhall of his responsibility for taxable income in respective states, Newhall refused his advice, "demeaning [Posner] and making [Posner] feel like a fool." (Posner Dep. at 50-51.) At some point in 1998, his personal accountant, Paul Simoneau, told him that he did not have to file a personal tax return in California.

In early November, 1999, Newhall received a "Notice of Proposed Assessment" from the State of California, assessing $1,487,827.92 in tax, penalties, interest and fees. It stated an estimated taxable income of $12,726,398.00. The Assessment referred to a notice that California sent to Newhall on February 19, 1999, notifying him that it had not received a 1997 tax return, and requested that he file a return, send a copy of any previously filed return, or provide information concerning why he was not required to file a 1997 tax return. In the Assessment, California further stated that Newhall had not responded to the February notice. Upon receiving the Assessment, Newhall paid it.

On or about December 21, 1999, Simoneau, a certified public accountant, requested and received a copy of the California Schedule K-1 (1997 tax year) from Samet.[2] It stated that the net long-term capital gain was $11,699,354 and the California source

[2]State-specific K-1 forms are used to report capital income of shareholders of an S-Corporation, which should be sourced to that particular state.

amount was $11,699,354. Simoneau then prepared Newhall's 1997 California tax return, which was filed on or about December 29, 1999.

On or about April 13, 2000, after receiving Newhall's 1997 return, California sent Newhall a re-calculated tax due notice for $1,966,310.62. At this point Newhall retained Alan D. Bollinger of KPMG to try to "get back the interest and penalties" assessed against him. Newhall agreed to pay KPMG a $25,000 retainer plus twenty-five percent of any rebate from the state of California. Upon reviewing Newhall's California K-1, Bollinger determined that one hundred percent of TAD's income, and consequentially all of Newhall's capital gains, were sourced to California, when the percentage should only have been nineteen percent. Bollinger further testified that the discrepancy was ascertainable "within minutes" from reviewing the California K-1. (Bollinger Dep. at 69-70.) KPMG obtained a tax, interest and penalties abatement of $1,656,468.85 for Newhall. The abatement included the tax overpaid to the state of California (with interest) and about eighty percent of the penalties and interest originally assessed.

Plaintiff filed this action in Suffolk Superior Court on March 31, 2003, seeking $441,117 in damages. On May 22, 2003, the Suffolk Superior Court allowed the Plaintiff to change the venue of this action from Suffolk to Norfolk County, where it was

entered on May 30, 2003. Defendants removed the case to this Court on July 14, 2003.

III. DISCUSSION

A. The Statute of Limitations

Defendants argue that Newhall's claims are time-barred pursuant to Mass. Gen. Laws Ann. ch. 260, §4 (2003), which provides that actions of contract or tort for "malpractice, error or mistake" against certified public accountants and public accountants must be brought within three years of the accrual of the cause of action. "Once the defendant pleads the statute of limitations as a defense to a malpractice action and establishes that the action was brought more than three years from the date of the injury, the burden of proving facts that take the case outside the impact of the statute falls to the plaintiff." Riley v. Presnell, 409 Mass. 239, 243-244, 565 N.E.2d 780, 785 (1991). In general, the cause of action in an accounting malpractice claim accrues at the time of the breach of contract or injury to the plaintiff. See Frank Cooke, Inc. v. Hurwitz, 10 Mass. App. Ct. 99, 106, 406 N.E.2d 678, 683 (1980). If the wrong or injury is "inherently unknowable," the cause of action accrues when the plaintiff knows or should reasonably have known that he has been injured. Riley, 409 Mass. at 245-248. The inherently unknowable wrong must have been incapable of detection by the wronged party through the exercise of reasonable diligence. See Int'l Mobiles

Corp. v. Gorroon & Black, Fairfield & Ellis, Inc., 29 Mass. App. Ct. 215, 222, 560 N.E.2d 122, 126 (1990).

Under the Massachusetts "discovery rule," the statute of limitations begins to run when a plaintiff has "(1) knowledge or sufficient notice that she was harmed and (2) knowledge or sufficient notice of what the cause of harm was." Bowen v. Eli Lilly & Co., 408 Mass. 204, 208, 210-11, 557 N.E.2d 739, 742-43 (1990). A plaintiff making claims in contract and tort against an accounting firm must exercise reasonable diligence in reviewing documents readily available to him and his agents. See Frank Cook, Inc. v. Horwitz, 10 Mass. App. Ct. at 108, 406 N.E.2d at 684 (dismissing claim where accountants' failures were readily apparent in documents available to plaintiff and his law firm).

The Court uses the standard of a reasonable person "in the position of the plaintiff." Id. Under the discovery rules, the courts recognize that a client is generally not an expert: "He cannot be expected to recognize professional negligence if he sees it, and he should not be expected to watch over the professional or to retain a second professional to do so." Hendrickson v. Sears, 365 Mass. 83, 88, 310 N.E.2d 131, 136 (1974) (holding in the context of a defective title search that a client cannot be expected to recognize an attorney's professional negligence).

B. The Accounting Puzzle

The controlling question, then, is whether a reasonable person in the position of the Plaintiff should have known in November or December, 1999 about the facts giving rise to his cause of action against the Defendant. Defendants argue that the $1.5 million tax assessment by the state of California received by the Plaintiff in November, 1999, should have put Plaintiff on notice of his potential claim against the Defendants. Plaintiff responds that the mistake in the California K-1 filed by Defendant was "inherently unknowable" to him, since he could not have known of the mistake by looking at the Assessment alone because he was not a CPA and the Notice of Assessment did not itself suggest that the 1997 California K-1 was erroneous.

Newhall's argument fails because Samet's failures were apparent in the documents readily available to Plaintiff and his accountant. It is accepted doctrine of agency law that a principal is bound by the knowledge of his agent. See Restatement (Second) of Agency, §272 (1957). Simoneau's knowledge gained in December 1999 is imputed to Newhall. The 1997 California K-1, which ignited the current dispute, displays the total amount of capital gains and the portion of such capital gains that were sourced specifically to California. Simoneau not only saw the Notice of Assessment, but also received a copy of the erroneous California K-1 sometime in late December, 1999.

Because these figures are displayed in adjacent columns, the relationship between them is transparent. The capital gains of $11,699,354 that Newhall realized from the sale of TAD appears once in the "Total" column and again in the adjacent "California Source" column. Even drawing reasonable inferences in favor of the Plaintiff, there is no genuine issue here. Through exercise of reasonable diligence, Simoneau should have known, from looking at the California K-1, that one hundred percent of Newhall's capital gains were sourced to California.

Since Newhall actually knew that only some of TAD's income was derived from business in California, and his agent knew that one hundred percent of that income was sourced to California, Newhall obtained the two critical pieces of the puzzle by December 1999. While many clients might not have had the expertise to review an accountant's work, here both Plaintiff, an accountant and former treasurer, and his own accountant, a CPA, had sufficient expertise. Because he knew or reasonably should have known he received a tax assessment based on a faulty K-1 in December 1999, this action is untimely.

CONCLUSION

Defendants' motion for summary judgment (Docket No. 18) is **ALLOWED**.

S/PATTI B. SARIS
United States District Judge